United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

77-1140

DOCKET NO. 77-1140

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

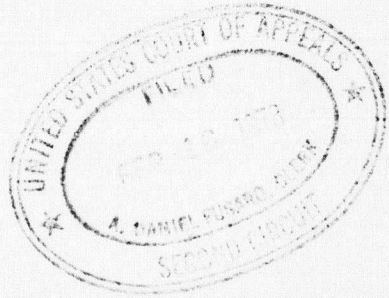
Appellee,

v.

DAVID STIRLING, JR., WILLIAM G. STIRLING, HAROLD M. YANOWITCH, EDWIN SCHULZ and RUBEL L. PHILLIPS,

Defendants-Appellants.

PETITION FOR REHEARING IN BEHALF OF RUBEL L. PHILLIPS



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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA APPELLEE	)	
VS	)	NO. 77-1140
DAVID STIRLING, JR., WILLIAM G. STIRLING, HAROLD M. YANOWITCH, EDWIN J. SCHULZ AND RUBEL L. PHILLIPS DEFENDANTS - APPELLANTS	)	

PETITION FOR REHEARING

Petitioner, Rubel L. Phillips, one of Mississippi's most distinguished attorneys, twice Republican nominee for governor, now stands convicted of a crime in the Southern District of New York. Phillips, only representing a client, got caught in the amorphous arms of a "conspiracy." Everything he did was legally and morally correct with the exception of an alleged forgery which Phillips emphatically denied and which was strenuously controverted.* Though everything Mr. Phillips was accused of doing took place in Mississippi, he was tried by New Yorkers, convicted by New Yorkers, and as it now stands would be jailed by New Yorkers. Appellant has expended all his resources defending this case.

* The only testimony that he committed the forgery came from an admitted perjurer.

On top of this, the Trial Judge instructed the jury (if not directly then by implication) that the immunized prosecution witnesses could not have testified unless they were telling the truth and that the defense witnesses, because of their interest in the case, were committing perjury. (Page 44-45, Opinion of the Court). The Trial Court also failed to give cautionary instructions as to interest of immunized witnesses.

Petitioner believes that a pathetic injustice is about to be done. For that reason Petitioner urges this Court to rehear this matter as to Rubel Phillips and to especially consider (1) the severance issue, and (2) the jury factual issue.

Petitioner most respectfully urges the Court to consider the following arguments of law with respect to a rehearing and then to order a rehearing en banc.

1.

THE FACTUAL ISSUE

There is no proof in the entire record of this trial that shows a common scheme or design of which the Appellant, Rubel Phillips, was a part. Herein lies the chief fault in the majority opinion of this Court. At page 29 of the Opinion of the Court, Judge Meskill wrote:

> "The real question, then, is not whether there was sufficient evidence regarding each and every specification, but, rather whether there was sufficient overall proof of the alleged scheme to defraud and conspiracy." (Lines 16-19).

Then at page 30 of the Opinion, the Court wrote:

"Each Appellant played a central role in some if not all of the various elements of the common scheme and in the overall maintenance of its life." (Lines 10-12).

To apply such language to Rubel Phillips requires an exceedingly long logical leap not explained in the Opinion. Appellant contends the logical gap is insurmountable, and cannot be bridged under the facts or the law. The Court must remember that Appellant was not charged with forgery or back-dating a contract. He was charged in combination with others, with mail fraud, Securities Act violation and conspiracy. There is no evidence in the record showing the Appellant was in any way connected with that central design. The gist of the offense is the agreement, and it is essential for the government to show what agreement or understanding existed as to each Defendant. United States vs Taylor, 562 F.2d 1345 (CA2, 1977).

Significantly, the Court, in its detailed delineation of the activities of the Appellants following its holding at Page 30 (quoted above) totally omitted any reference to the Appellant Rubel Phillips. We emphasize again that there is no evidence of record providing a logical or legal connection between the Appellant, Rubel Phillips, and the fraudulent sale of the stock of Stirling Homex Corporation. The inference of the Court that because the Stirlings, Yanowitch, and Schulz are guilty, Rubel Phillips is also guilty, is a totally erroneous inference. The effect of the failure to connect Phillips with

a central scheme (though there may have been one) was aggravated by the Trial Court's instructions. The Trial Court suggested strongly in its charge to the Jury that the defendant had committed perjury in stating that the Defendants had a ... "deep and profound and abiding interest in the outcome ..." and commented that cooperating witnesses who had been immunized would have lost that immunity had they testified falsely. The Court said also that perjury had been committed. These comments, coupled with a failure to give the Jury an adequate "close scrutiny" or cautionary instruction with respect to immunized testimony and failure to prove a common scheme was plain error requiring reversal of Appellant Phillips' conviction. United States vs Swiderski, 539 F.2d 854 (2d Cir, 1976). In Swiderski, supra, the Trial Judge, as here, commented on the interest of a defendant-witness in the trial's outcome; then only gave perfunctory mention of the possible effect of self-interest in the testimony of an informer. The conviction was reversed. Here, as in Swiderski, once the Court chose to address the matter of self-interest of any witness, it should have fully covered the possible motive or bias on the part of all the witnesses, including prosecution witnesses. There is no valid distinction between the informer testimony in Swiderski and the testimony here of an immunized witness. (Both were trying to save themselves.)

It has been repeatedly held that failure of a Trial Judge to give a full and adequate cautionary instruction as to accomplice testimony, even though not specifically requested to do so by the defendant, constitutes ground for reversal under the doctrine of plain error. McMillen vs United States, (1st Cir, 1967) 386 F.2d 29, cert. denied, 390 U.S. 1031, 88 S.Ct. 1424; United States vs Evans, 398 F.2d 159 (3rd Cir, 1968); Williamson vs United States, 332 F.2d 123 (5th Cir, 1964). All of the foregoing authorities recognized that a fair trial requires that the jury be properly instructed on the evaluation and use of accomplice testimony. In fact, the charge of the Trial Judge in this area was so biased as to be tantamount to an instruction to the Jury to convict. This was totally outside the Trial Judge's province.

2.

THE SEVERANCE ISSUE

This Court has rejected Appellant's contention that he should have been granted a Rule 14 severance. Appellant has no argument with the authority cited by this Court. In each instance, the cases cited stand for the principles of law enunciated by this Court. However, Appellant submits that the facts of his case differ in crucial points and further submits that this Court has overlooked important judicial policy decisions in rejecting this assignment of error. This Court quoted 8 Moore's Federal Practice 14.02 [1] et seq, in

its opinion. It must be further noted that Moore's Federal Practice, a most distinguished and authoritative treatise, criticized the severance rules relied on by this Court. In his chapter on severances under Rule 14, Moore justified the stringent rules regarding severances (echoed previously by Learned Hand) on the grounds that criminal conspiracy defendants must be tried jointly, or they would probably not be tried at all. In other words, an injustice must perhaps be imposed upon a few in order that more of the guilty may be more easily and conveniently convicted. Indeed, much of that reasoning is inherent in several of the cases cited by this Court (See for instance: United States vs Miley, 513 F.2d 1191 (CA2, 1975), a drug conspiracy case; United States vs Taylor, 562 F.2d 1345 (CA2, 1977), a massive narcotics conspiracy; and United States vs Armedo-Sarmiento, 545 F.2d 785 (CA2, 1976), a large cocaine conspiracy.) All of these cases were drug cases and involved far more persons than did the case sub judice. Here, we are dealing with the motion of only one defendant to have his trial severed. Surely, the scarcity of judicial resources is not as important a consideration here as it was in the cases above cited. In this regard, it is useful to cite the language of the Court in United States vs Finkelstein, 562 F.2d 517 (CA5, 1975):

> "While we are not unmindful of the necessity to husband scarce and overburdened judicial resources we also must acknowledge that duplication of proof is often inevitable in situations meriting separate

trials." United States vs Finkelstein, supra, at Page 524.

In Appellant Phillips' case, the Trial Court would not have been forced to plow all its rows twice. Let us assume for the moment that there was indeed only one conspiracy. Even the sternest prosecutor would have to admit there were many facets to the conspiracy. This Court admitted as much when it broke down the history of Homex into different "Chapters," e.g., "Incorporation and Going Public", "The 1968-1969 Fiscal Year," "The Kece Mortgage Payment" and "The Greater Gulf Coast Housing Development Corporation." There is no contention that Rubel Phillips participated in every facet of the conspiracy alleged; to the contrary, his indictment arose only from the Greater Gulf Coast Housing chapter. This Court, and the lower Court have both noted that he was not named in various specifications of the indictment. (Page 42, Line 15, Opinion of the Court.)

The Appellant's case would have been an ideal case, for severance. The "Greater Gulf" transaction was "self-contained". The proof of it did not require proof on the "Kece Mortgage", for instance. In short, few judicial resources would have been wasted. Conversely, Appellant Rubel Phillips would have been judged by a jury of his peers on what he and he alone had done. (Assuming a severance and a change of venue.) The Trial Court was not faced with the prospect of severing eleven narcotics peddlers each from the other. The Appellant contends

that the failure to grant his motion for a severance was an abuse of discretion on the part of the Trial Judge under these particular circumstances.

Further by way of support for this Petition, Appellant wishes to point out that legal scholars other than Moore are increasingly attacking the concept of the absolute necessity for jointly trying ever increasing masses of conspirators. (See Justice Douglas' dissenting opinion in Schaffer vs. United States, 362 U.S. 511, 4L.Ed.2d 912, 80 S.Ct. 945 (1960), Guilt By Association-Three Words In Search Of A Meaning, 17 University of Chicago Law Rev. 148, and The Conspiracy Dilemma: Prosecution of Group Crime Or Protection of Individual Defendants, 62 Harvard L.Rev. 276).

Also, Appellant respectfully submits that this Court has misconstrued the issue. This Court at Page 42 of its opinion makes much of the instructions given to the jury concerning single/multiple conspiracies. The instructions are not the issue. The issue is that the Appellant should not have been in the trial when the instructions were given. The Appellant, a "Johnny-come-lately" to the Homex melodrama should not have been tried with the veterans (who sucked him in) when his case could have been easily severed from those of the owners and controlling persons in Homex. The failure to grant Appellant a severance forced him to shoulder the full burden of years of mistakes by others. Such is not our law. With us, guilt is

personal, even on a conspiracy charge. United States vs Borelli, 336 F.2d 376 (CA5, 1964). The Appellant was fatally hamstrung and tainted by having to stand trial with the other defendants, and this issue should be reheard.

CONCLUSION

Petitioner thinks the above arguments show signficant oversights in the opinion which should be reviewed by this Court. We want to especially remind the Court of what is at stake here. Rubel Phillips, a small town lawyer, became involved in a complicated business venture arising in a much more industrialized part of the Country. Before he could understand the implications of what was happening it was too late. All he did was represent a client to the best of his ability (excluding the highly controverted and denied alleged forgery). We feel that the legal system will have failed if a person of his caliber is allowed to be blindly sucked into total disaster without proper chances for defense. The conspiracy theory can be taken so far that it becomes a destructive force bringing about wrong instead of right. We feel that the Court in this case must be patient to prevent a wrong that cannot be prevented by anyone else on earth.

Respectfully submitted,

RUBEL PHILLIPS

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Myrtle Baltuch, being duly sworn, deposes and says:

1. I am over 18 years of age, not a party to this action and am employed by Patterson, Belknap, Webb & Tyler, 30 Rockefeller Plaza, New York, New York 10020.

2. On the 16th day of February, 1978, I served two copies of the foregoing Petition for Rehearing upon the following attorneys by causing to be deposited x true and correct copies of the same, properly enclosed in a postpaid wrapper in a mail depository regularly maintained by the United States Postal Service at 30 Rockefeller Plaza, New York, New York directed to them at the addresses below, which are the latest addresses designated by them for that purpose:

Robert B. Fiske, Jr., Esq.
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Hawkins, Delafield & Wood
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Myrtle Baltuch
Myrtle Baltuch

Sworn to before me this
16th day of February 1978.

Lillian Limbrick
Notary Public

LILLIAN LIMBRICK
Notary Public, State of New York
No. 41-7364860
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1979